

**EMPLOYMENT APPEALS BOARD DECISION**  
**2024-EAB-0413**

*Affirmed*  
*Late Request for Hearing Allowed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On November 23, 2020, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant voluntarily quit work without good cause and therefore was disqualified from receiving unemployment insurance benefits effective April 12, 2020 (decision # 132430). On December 14, 2020, decision # 132430 became final without claimant having filed a request for hearing. On November 2, 2021, claimant filed a late request for hearing on decision # 132430. ALJ Kangas considered claimant's request, and on January 7, 2022, issued Order No. 22-UI-183552, dismissing claimant's request for hearing as late, subject to claimant's right to renew the request by responding to an appellant questionnaire by January 21, 2022. On January 27, 2022, Order No. 22-UI-183552 became final without claimant having filed a response to the appellant questionnaire. On March 14, 2022, claimant filed a late response to the appellant questionnaire.

On June 22, 2022, the Office of Administrative Hearings (OAH) mailed a letter stating that Order No. 22-UI-183552 was vacated and that a new hearing would be scheduled to determine whether claimant had good cause to file the late request for hearing and, if so, the merits of decision # 132430. On April 1, 2024, ALJ Enyinnaya conducted a hearing at which the Department submitted an attestation in lieu of attendance, and on April 10, 2024, issued Order No. 24-UI-251908, allowing claimant's late request for hearing and reversing decision # 132430 by concluding that claimant was discharged, but not for misconduct, and therefore was not disqualified from receiving benefits based on the work separation. On April 30, 2024, the employer filed an application for review of Order No. 24-UI-251908 with the Employment Appeals Board (EAB).

**WRITTEN ARGUMENT:** EAB considered the employer's written argument when reaching this decision.

**EVIDENTIARY MATTER:** EAB has considered additional evidence when reaching this decision under OAR 471-041-0090(1) (May 13, 2019). The additional evidence consists of claimant's response

to the appellant questionnaire, and has been marked as EAB Exhibit 1, and a copy provided to the parties with this decision. Any party that objects to our admitting EAB Exhibit 1 must submit such objection to this office in writing, setting forth the basis of the objection in writing, within ten days of our mailing this decision. OAR 471-041-0090(2). Unless such objection is received and sustained, the exhibit will remain in the record.

**FINDINGS OF FACT:** (1) Cornerstone Security Group (“the employer”) employed claimant as a security guard from October 6, 2019, through the latter half of 2020. The employer employed claimant on a “temporary/on-call” basis. Transcript at 22.

(2) Claimant initially signed his employment agreement with the employer on October 6, 2019. However, claimant was already working full time for another employer at that point, and therefore was not immediately available to accept work assignments from the employer.

(3) In or around March 2020, claimant’s regular employer temporarily closed due to the COVID-19 pandemic. The employer later offered claimant a security detail assignment at a construction site, scheduled to start on or around March 30, 2020. The assignment was intended to last until the employer’s client installed a security camera system, which claimant understood could take up to a month to complete. Claimant began the assignment as instructed and worked until April 12, 2020. After that date, the employer told claimant that the client’s cameras were online and therefore claimant was no longer needed.

(4) Later in 2020, the employer contacted claimant on two separate occasions with offers of additional assignments. Claimant had already returned to work for his regular employer as of July 2020, however, and was therefore not available to accept those assignments. After claimant declined the second assignment, the employer advised claimant “to let [the employer] know... if he needed any other work.” Transcript at 23. The employer did not contact claimant for additional work after that point because they decided they “were gonna stop harassing [claimant] basically.” Transcript at 23.

(5) On November 23, 2020, the Department mailed decision # 132430 to claimant’s address of record. Decision # 132430 stated, “You have the right to appeal this decision if you do not believe it is correct. Your request for appeal must be received no later than December 14, 2020.” Exhibit 3 at 4. Decision # 132430 did not indicate that an overpayment could result from the disqualification from benefits. Claimant received the decision shortly after it was mailed but, believing it to be a tax document that did not require his immediate attention, he set it aside without opening the envelope.

(6) In or around January 2021, claimant received a phone call from a Department representative. The representative informed claimant about decision # 132430 and that he was denied benefits as a result. The representative concluded the call by stating, “Okay, I’ve got what I need. You’ll be hearing from us.” Transcript at 10. Following the phone call, claimant understood that he had been denied benefits, but also believed that the matter “had been resolved.” Transcript at 9–10. Claimant took no further action at that time.

(7) On September 5, 2021, claimant moved from Oregon to South Dakota. While en route to South Dakota, claimant contracted COVID-19 and was hospitalized until September 21, 2021. Claimant’s

recovery from COVID-19, which required the use of supplemental oxygen, took six weeks. During this time, claimant's mail was "held, and forwarded." EAB Exhibit 1 at 1.

(8) On September 30, 2021, the Department issued an administrative decision, based in part on decision # 132430, concluding that claimant had received benefits to which he was not entitled, and assessing an overpayment of \$3,638 in regular unemployment insurance (regular UI) benefits and \$8,400 in Federal Pandemic Unemployment Compensation (FPUC) benefits that claimant was required to repay to the Department (decision # 125707). On October 20, 2021, decision # 125707 became final without claimant having filed a request for hearing.<sup>1</sup>

(9) On October 27, 2021, claimant had sufficiently recovered from COVID-19 that he was able to read his mail. At that point, he read decision # 125707. On November 2, 2021, claimant filed requests for hearing on decisions # 132430 and 125707.<sup>2</sup>

**CONCLUSIONS AND REASONS:** Claimant's late request for hearing is allowed. Claimant was discharged, but not for misconduct.

**Late request for hearing.** ORS 657.269 provides that the Department's decisions become final unless a party files a request for hearing within 20 days after the date the decision is mailed. ORS 657.875 provides that the 20-day deadline may be extended a "reasonable time" upon a showing of "good cause." OAR 471-040-0010 (February 10, 2012) provides that "good cause" includes factors beyond an applicant's reasonable control or an excusable mistake, and defines "reasonable time" as seven days after those factors ceased to exist.

The request for hearing on decision # 132430 was due by December 14, 2020. Because claimant did not file his request until November 2, 2021, the request was late. The record shows that claimant's filing delay was caused by three separate factors: claimant's failure to timely open the envelope in which the decision was mailed, his mistaken belief that the matter was settled after speaking to a Department representative in January 2021, and, later, a debilitating COVID-19 infection. It is not necessary to determine whether the first two of these factors constituted good cause for filing the late request for hearing, however, because the record shows that the language in decision # 132430 was insufficient to satisfy due process requirements under the 14<sup>th</sup> Amendment to the United States Constitution because it failed to provide adequate notice of the decision's implications on claimant's right to benefits and potential overpayment liability.<sup>3</sup>

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<sup>1</sup> EAB has taken notice of these facts, which are contained in Employment Department records. OAR 471-041-0090(1). Any party that objects to our taking notice of this information must submit such objection to this office in writing, setting forth the basis of the objection in writing, within ten days of our mailing this decision. OAR 471-041-0090(2). Unless such objection is received and sustained, the noticed fact will remain in the record.

<sup>2</sup> EAB has taken notice of these facts, which are contained in Employment Department records. OAR 471-041-0090(1). Any party that objects to our taking notice of this information must submit such objection to this office in writing, setting forth the basis of the objection in writing, within ten days of our mailing this decision. OAR 471-041-0090(2). Unless such objection is received and sustained, the noticed fact will remain in the record.

<sup>3</sup> U.S. Const. amend. XIV, §1 provides, in relevant part, "[N]or shall any State deprive any person of life, liberty, or property, without due process of law[.]"

While decision # 132430 notified claimant that he was disqualified from receiving benefits as of a particular date, it did not identify the specific weeks of benefits for which he would be denied or the amount (or approximation) of the overpayment that could result from its determination of ineligibility. In order for claimant to have meaningfully understood decision # 132430, due process required the Department to inform claimant of the consequences of the retroactive change in his benefit entitlement *during the period in which claimant could have timely requested a hearing on that administrative decision*. In other words, because the Department did not notify claimant of the amount, or approximation thereof, of the overpayment that might result from decision # 132430's disqualification from benefits (or, for that matter, that an overpayment might result at all), claimant was unable to make an informed decision as to "whether to spend the time and resources challenging the decision."<sup>4</sup> This failure to provide claimant with due process constituted a factor beyond his reasonable control which caused him to file a timely request for hearing.

That factor resolved once the Department issued decision # 125707, which specifically stated the amount of the overpayment that the Department had assessed as a result of the disqualification under decision # 132430. At that point, however, another factor beyond claimant's reasonable control prevented him from filing a request for hearing. The record shows that claimant was ill with COVID-19, and therefore unable to access his mail or attend to matters such as appealing an administrative decision, from approximately mid-September 2021 until October 27, 2021, at which point he had sufficiently recovered. The factors which prevented claimant from filing the timely request for hearing ceased on that date. Claimant filed his request for hearing on November 2, 2021, which was within the seven-day "reasonable time" period required by OAR 471-040-0010.

For the above reasons, claimant had good cause for filing his late request for hearing on decision # 132430, and filed his late request for hearing within a reasonable time after the factors which prevented his timely filing had ceased.

**Nature of the work separation.** If the employee could have continued to work for the same employer for an additional period of time, the work separation is a voluntary leaving. OAR 471-030-0038(2)(a) (September 22, 2020). If the employee is willing to continue to work for the same employer for an additional period of time but is not allowed to do so by the employer, the separation is a discharge. OAR 471-030-0038(2)(b).

The order under review concluded that the employer discharged claimant because claimant "was hired as a temporary employee," but was not allowed to continue working for the employer for an additional period of time because claimant's work assignment ended. Order No. 24-UI-251908 at 4. In their written argument, the employer assigned error to this conclusion, explaining:

[The employer] offered [claimant] additional work serving as a security guard for another client, but [claimant] rejected [the employer's] offers. [Claimant] never accepted a job [the employer] offered after the initial March 30, 2020 job. Because [claimant] refused to perform additional work for [the employer] despite [the employer] offering work, [the employer] determined [claimant] voluntarily abandoned his position. [Claimant] never asked for additional work after

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<sup>4</sup> See *Casillas v. Gerstenfeld*, No. 22CV18836 (Mult. Co. Cir. Ct. Apr. 5, 2024) Letter Opinion on Cross Motions for Summary Judgment at 10-11; See also generally *Mullane v. Central Hanover Bank & Trust Co.*, 339 US 306 (1950).

April 12, 2020. [The employer] had ample work for [claimant], had he accepted it. [The employer] paid other employees overtime to cover work [claimant] could have performed.

Employer’s Written Argument at 2–3. In fact, the record shows that the employer discharged claimant, but at a different time than identified by the order under review. Claimant completed a single assignment for the employer on April 12, 2020, and stopped performing work for the employer at that point. Although the assignment lasted two weeks, claimant’s understanding when he accepted the assignment was that it could last up to a month. Therefore, it is reasonable to infer that claimant would have been willing to continue working for the employer at that particular assignment if it had lasted longer, and the record therefore does not show that claimant took any actions at that point which could constitute a severance of the employment relationship. Likewise, while that particular assignment ended on April 12, 2020, the record shows that employer remained willing to employ claimant on other assignments, and in fact made two such offers to claimant later in 2020. Claimant rejected those offers because he had resumed working for his regular employer.

However, the record lacks evidence to show that claimant categorically rejected ever working for the employer again on an on-call basis, he simply was not available for two assignments offered to him. Given the “temporary/on-call” nature of claimant’s work for the employer, rejecting two offers of temporary work due to unavailability does not show that claimant intended to never work for the employer again. On the contrary, while the employer might have liked to continue employing claimant, they nevertheless decided to stop offering claimant work after he rejected those two offers in order to “stop harassing him basically.” Transcript at 23. This suggests that the employer was no longer willing to employ claimant after claimant rejected the second offer of work because they believed he would not accept any such offers. While the record does not show exactly when this occurred, it can be reasonably inferred that it occurred sometime in the latter half of 2020, as claimant had resumed working for his regular employer in July 2020. Therefore, the work separation was a discharge which occurred in the latter half of 2020.

**Discharge.** ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for misconduct connected with work. “As used in ORS 657.176(2)(a) . . . a willful or wantonly negligent violation of the standards of behavior which an employer has the right to expect of an employee is misconduct. An act or series of actions that amount to a willful or wantonly negligent disregard of an employer's interest is misconduct.” OAR 471-030-0038(3)(a) (September 22, 2020). “[W]antonly negligent’ means indifference to the consequences of an act or series of actions, or a failure to act or a series of failures to act, where the individual acting or failing to act is conscious of his or her conduct and knew or should have known that his or her conduct would probably result in a violation of the standards of behavior which an employer has the right to expect of an employee.” OAR 471-030-0038(1)(c). In a discharge case, the employer has the burden to establish misconduct by a preponderance of evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

As explained above, the employer discharged claimant sometime in the latter half of 2020 because he had rejected two offers of temporary work. Claimant did so because he had resumed his work for his regular employer, and therefore was unavailable for those assignments. The “temporary/on-call” nature of claimant’s work for the employer indicates that claimant was free to choose which assignments, if any, he accepted from the employer. His rejection of those offers, therefore, did not constitute willful or wantonly negligent violations of the employer’s standards of behavior. As such, the employer

discharged claimant, but not for misconduct, and claimant is not disqualified from receiving unemployment insurance benefits based on the work separation.

**DECISION:** Order No. 24-UI-251908 is affirmed.

D. Hettle and A. Steger-Bentz;  
S. Serres, not participating.

**DATE of Service: June 12, 2024**

**NOTE:** You may appeal this decision by filing a Petition for Judicial Review with the Oregon Court of Appeals within 30 days of the date of service listed above. *See* ORS 657.282. For forms and information, you may write to the Oregon Court of Appeals, Records Section, 1163 State Street, Salem, Oregon 97310 or visit the Court of Appeals website at [courts.oregon.gov](https://courts.oregon.gov). Once on the website, use the ‘search’ function to search for ‘petition for judicial review employment appeals board’. A link to the forms and information will be among the search results.

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# Understanding Your Employment Appeals Board Decision

## English

Attention – This decision affects your unemployment benefits. If you do not understand this decision, contact the Employment Appeals Board immediately. If you do not agree with this decision, you may file a Petition for Judicial Review with the Oregon Court of Appeals following the instructions written at the end of the decision.

## Simplified Chinese

注意 – 本判決會影響您的失業救濟金。如果您不明白本判決，請立即聯繫就業上訴委員會。如果您不同意此判決，您可以按照該判決結尾所寫的說明，向俄勒岡州上訴法院提出司法複審申請。

## Traditional Chinese

注意 – 本判決會影響您的失業救濟金。如果您不明白本判決，請立即聯繫就業上訴委員會。如果您不同意此判決，您可以按照該判決結尾所寫的說明，向俄勒岡州上訴法院提出司法複審申請。

## Tagalog

Paalala – Nakakaapekto ang desisyong ito sa iyong mga benepisyo sa pagkawala ng trabaho. Kung hindi mo naiintindihan ang desisyong ito, makipag-ugnayan kaagad sa Lupon ng mga Apela sa Trabaho (Employment Appeals Board). Kung hindi ka sumasang-ayon sa desisyong ito, maaari kang maghain ng isang Petisyon sa Pagsusuri ng Hukuman (Petition for Judicial Review) sa Hukuman sa Paghahabol (Court of Appeals) ng Oregon na sinusunod ang mga tagubilin na nakasulat sa dulo ng desisyon.

## Vietnamese

Chú ý - Quyết định này ảnh hưởng đến trợ cấp thất nghiệp của quý vị. Nếu quý vị không hiểu quyết định này, hãy liên lạc với Ban Kháng Cáo Việc Làm ngay lập tức. Nếu quý vị không đồng ý với quyết định này, quý vị có thể nộp Đơn Xin Tái Xét Tư Pháp với Tòa Kháng Cáo Oregon theo các hướng dẫn được viết ra ở cuối quyết định này.

## Spanish

Atención – Esta decisión afecta sus beneficios de desempleo. Si no entiende esta decisión, comuníquese inmediatamente con la Junta de Apelaciones de Empleo. Si no está de acuerdo con esta decisión, puede presentar una Aplicación de Revisión Judicial ante el Tribunal de Apelaciones de Oregon siguiendo las instrucciones escritas al final de la decisión.

## Russian

Внимание – Данное решение влияет на ваше пособие по безработице. Если решение Вам непонятно – немедленно обратитесь в Апелляционный Комитет по Трудоустройству. Если Вы не согласны с принятым решением, вы можете подать Ходатайство о Пересмотре Судебного Решения в Апелляционный Суд штата Орегон, следуя инструкциям, описанным в конце решения.

**Khmer**

ចំណុចសំខាន់ – សេចក្តីសម្រេចនេះមានផលប៉ះពាល់ដល់អត្ថប្រយោជន៍គ្មានការងារធ្វើរបស់លោកអ្នក។ ប្រសិនបើលោកអ្នកមិនយល់អំពីសេចក្តីសម្រេចនេះ សូមទាក់ទងគណៈកម្មការឧទ្ធរណ៍ការងារភ្លាមៗ។ ប្រសិនបើលោកអ្នកមិនយល់ស្របចំពោះសេចក្តីសម្រេចនេះទេ លោកអ្នកអាចដាក់ពាក្យប្តឹងសុំឲ្យមានការពិនិត្យរឿងក្តីឡើងវិញជាមួយតុលាការឧទ្ធរណ៍រដ្ឋ Oregon ដោយអនុវត្តតាមសេចក្តីណែនាំដែលសរសេរនៅខាងចុងបញ្ចប់នៃសេចក្តីសម្រេចនេះ។

**Laotian**

ເອົາໃຈໃສ່ – ຄໍາຕັດສິນນີ້ມີຜົນກະທົບຕໍ່ກັບເງິນຊ່ວຍເຫຼືອການຫວ່າງງານຂອງທ່ານ. ຖ້າທ່ານບໍ່ເຂົ້າໃຈຄໍາຕັດສິນນີ້, ກະລຸນາຕິດຕໍ່ຫາຄະນະກຳມະການອຸທອນການຈ້າງງານໃນທັນທີ. ຖ້າທ່ານບໍ່ເຫັນດີນຳຄໍາຕັດສິນນີ້, ທ່ານສາມາດຍື່ນຄໍາຮ້ອງຂໍການທົບທວນຄໍາຕັດສິນນຳສານອຸທອນລັດ Oregon ໄດ້ໂດຍປະຕິບັດຕາມຄໍາແນະນຳທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄໍາຕັດສິນນີ້.

**Arabic**

هذا القرار قد يؤثر على منحة البطالة الخاصة بك، إذا لم تفهم هذا القرار، إتصل بمجلس منازعات العمل فوراً، و إذا كنت لا توافق على هذا القرار، يمكنك رفع شكوى للمراجعة القانونية بمحكمة الاستئناف بأوريغون و ذلك بإتباع الإرشادات المدرجة أسفل القرار.

**Farsi**

توجه - این حکم بر مزایای بیکاری شما تاثیر می گذارد. اگر با این تصمیم موافق نیستید، بلافاصله با هیأت فرجام خواهی استخدام تماس بگیرید. اگر از این حکم رضایت ندارید، می‌توانید با استفاده از دستور العمل موجود در پایان آن، از دادگاه تجدید نظر اورگان درخواست تجدید نظر کنید.

**Employment Appeals Board - 875 Union Street NE | Salem, OR 97311**  
 Phone: (503) 378-2077 | 1-800-734-6949 | Fax: (503) 378-2129 | TDD: 711  
[www.Oregon.gov/Employ/eab](http://www.Oregon.gov/Employ/eab)

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